A **BLUE VALLEY PLANTATION BHD**

v.

PERIASAMY KUPPANNAN & ORS

B FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDDIN FCJ
MOHD GHAZALI YUSOFF FCJ
[CIVIL APPEAL NO: 02( )-1-2010(A)]
C 15 APRIL 2011

CIVIL PROCEDURE: *Striking out - Winding up petition - Respondents continued to seek for appellant company to be wound up despite payment claimed deposited in court - Whether petition an abuse* D *of court's process - Eight-year delay in filing striking out application - Whether inordinate delay on appellant's part - Whether striking out application justified - Rules of the High Court 1980, O. 18 r. 19*

The respondents (all 22 of them) filed a petition to wind up the E appellant company on the ground that the appellant failed to pay a sum of RM5,453,924.75 under a consent order that had been agreed to by the said parties. Under the consent order, the appellant had to pay each respondent a certain amount out of the said sum within 12 months of the service of the consent order F which could be extended subject to payment of interest. Also, each respondent had to be given pieces of land of varying sizes totalling 65 acres. The respondents had been given vacant possession of their respective pieces of land which they had occupied. They had also carried activities on them which they had G derived some income from. In November 2000, following the appellant's failure to pay the amount due under the consent order, the respondents filed a petition to wind up the appellant. A provisional liquidator was appointed thereafter. On 7 November 2008, about eight years after the petition was filed, the appellant H filed an application to strike out the petition under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'). The Court of Appeal dismissed the application on the ground that there was inordinate delay in the filing of the application. The appellant now appealed.

The appellant argued that the respondents continued to seek to I wind up the appellant despite the payment claimed by them was deposited in court with interest. The real reason for such

persistence was because they had wanted an additional 65 acres of land to be distributed amongst them *in lieu* of the cash payments that were delayed, and that the value of the 65 acres of land were worth more than the payment claimed. On the other hand, the respondents argued that their reason for not accepting the payment was due to the fear that if the payment was accepted, it might be ordered to be paid back to the provisional liquidator on being construed as preferential payment under s. 264 of the Companies Act 1965.

Held (allowing the appeal)
Per Zaki Tun Azmi CJ (Mohd Ghazali Yussof FCJ concurring)

(1) It would make no difference if the respondents were to accept the payment deposited in court and having to repay it later as preference creditors or waiting for the appellant to be wound up and the respondents having to collect their share of the dividends from the appellant. The net amount the respondents would finally get would be the same. If they were to take the payment deposited in court, there was still a strong possibility that the appellant might not be wound up. The respondents had acted unreasonably by refusing to accept the appellant's tender of payment and its continued readiness to pay which was shown by the appellant when it deposited the relevant amount in court. (paras 11 & 12)

(2) The respondents had acted in a vexatious manner and abused the process of the court by continuing to seek for the appellant to be wound up even after the appellant had in good faith paid the payment into court. Although at the filing of the petition, a petitioner might have acted in good faith, the subsequent conduct or action by him may provide grounds for the other party to seek to strike out the action. In the instant case, the application to strike out the petition was filed soon after the tender for payment of the respondents' claim was deposited in court. Therefore, there was no undue delay on the part of the appellant. (para 22)

Per Zulkefli Makinudin FCJ (concurring):

(1) There was clear evidence that the parties were negotiating for a settlement all the way. When the consent order dated 18 October 1996 was recorded, the parties knew that the

A settlement process would take time. Under the consent order, each respondent was to receive a certain sum of money and a certain portion of land in return for the surrender of their shares. The respondents were to receive portions of their land upon subdivision of the appellant's land. The appellant was to
B conduct a survey, allocate, subdivide and transfer their portions. The subdivision took time as the initial submission for subdivision was delayed by the land acquisition process carried out by the government on certain portions of the appellant's land. The respondents were well aware of the delay caused by
C the subdivision. They were also aware from the beginning that, other than the said acres of land due to them, the appellant could sell its other lands to settle its debts. (para 30)

(2) The fact that the respondents filed the petition to wind up
D the appellant in November 2000, about four years after the consent order was recorded, fortified the appellant's contention that the parties were negotiating for a settlement, notwithstanding the fact that under the consent order the obligations of the parties were to be performed within the
E period of 12 months of the service of the consent order. Further, no reasons were given as to why the petition filed by the respondents was not heard and disposed of at the first hearing date fixed by the court. In the circumstances, there should be no objections against the appellant filing the striking
F out action in November 2008 since the respondents themselves failed to proceed with their petition filed in 2000 pending before the court. (paras 31 & 33)

(3) The appellant had a justifiable ground to file the application to
G strike out the petition when in good faith it had made payment into court to pay to the respondents the agreed sum under the consent order. As such, the respondents were deemed to have acted in a vexatious manner which was a good ground for striking out the petition. On the facts and
H circumstances of the case, the ground of inordinate delay could not be attributed to the appellant to dismiss its striking out application. (paras 33 & 34)

I

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden (22 orang kesemuanya) telah memfailkan petisyen untuk menggulung syarikat perayu atas alasan bahawa perayu gagal membayar sejumlah RM5,453,924.75 yang dipersetujui oleh pihak-pihak berkenaan di bawah satu perintah persetujuan. Di bawah perintah persetujuan, perayu perlu membayar sejumlah wang kepada setiap responden dalam tempoh 12 bulan bermula dari penyerahan perintah persetujuan, tetapi tempoh tersebut boleh dilanjutkan tertakluk kepada pembayaran faedah. Selain itu, setiap responden perlu diberikan bidang tanah dengan keluasan yang berbeza-berbeza berjumlah 65 ekar kesemuanya. Responden-responden telah diberikan milikan kosong bidang-bidang tanah mereka masing-masing dan telah pun mendudukinya. Mereka juga telah menjalankan aktiviti-aktiviti di situ dan memperoleh pendapatan darinya. Pada bulan November 2000, ekoran kegagalan perayu membayar jumlah yang harus dibayar di bawah perintah persetujuan, responden-responden telah memfailkan petisyen bagi menggulung perayu. Pelikuidator sementara kemudian telah juga dilantik. Pada 7 November 2008, selepas lebih kurang lapan tahun petisyen difailkan, perayu memfailkan permohonan untuk mengenepikan petisyen di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Rayuan telah menolak permohonan atas alasan bahawa terdapat kelewatan yang keterlaluan dalam memfailkan permohonan. Perayu kini merayu.

Perayu berhujah bahawa responden-responden terus cuba untuk mendapatkan penggulungan walaupun jumlah yang dipohon oleh mereka telah pun didepositkan ke mahkamah. Menurut perayu, sebab sebenar kegigihan responden-responden ini adalah bahawa mereka inginkan tanah tambahan sebanyak 65 ekar untuk diagih-agihkan di kalangan mereka sebagai ganti pembayaran tunai, disebabkan nilai 65 ekar tanah tersebut adalah lebih tinggi dari pembayaran yang dituntut. Responden-responden sebaliknya berhujah bahawa sebab kenapa mereka tidak menerima pembayaran adalah kerana kebimbangan bahawa jika mereka menerimanya, ia mungkin diperintah supaya dibayarkan kembali kepada pelikuidator sementara sebagai bayaran keutamaan di bawah s. 264 Akta Syarikat 1965.

Diputuskan (membenarkan rayuan):
Oleh Zaki Tun Azmi KHN (Mohd Ghazali Yusoff HMP menyetujui):

(1) Tidak ada bezanya di antara responden-responden menerima pembayaran yang didepositkan di mahkamah dan kemudian terpaksa membayarnya semula kepada kreditor keutamaan atau menunggu sehingga perayu digulungkan dan kemudian mengambil bahagian dividen mereka masing-masing dari perayu. Jumlah bersih yang responden-responden akan terima akhirnya adalah sama. Jika mereka mengambil jumlah yang didepositkan di mahkamah, kemungkinan besar masih wujud bahawa perayu tidak akan digulungkan. Responden-responden telah bertindak dengan secara yang tidak munasabah apabila menolak tawaran pembayaran perayu serta kesediaan perayu untuk membayar seperti yang dibuktikan perayu apabila mendepositkan jumlah yang relevan ke mahkamah.

(2) Responden-responden telah bertindak secara yang menyusahkan dan telah menyalahguna proses mahkamah apabila terus berusaha untuk menggulungkan perayu walaupun selepas perayu dengan suci hati membuat pembayaran ke mahkamah. Walaupun semasa pemfailan petisyen, seorang pempetisyen mungkin bertindak dengan suci hati, tindakan dan kelakuannya yang menyusul kemudian boleh memberikan alasan kepada suatu pihak untuk memohon membatalkan petisyen. Dalam kes semasa, permohonan untuk membatalkan petisyen dibuat sejurus selepas tawaran pembayaran kepada tuntutan responden-responden didepositkan ke mahkamah. Oleh itu, tiada kelengahan keterlaluan di pihak perayu.

Oleh Zulkefli Makinudin HMP (menyetujui):

(1) Terdapat bukti jelas bahawa pihak-pihak telah berterusan berunding untuk mencapai penyelesaian. Bilamana perintah persetujuan bertarikh 18 Oktober 1996 direkodkan, pihak-pihak mengetahui bahawa proses penyelesaian akan mengambil masa. Di bawah perintah persetujuan, setiap responden akan mendapat sejumlah wang serta sebidang tanah sebagai ganti kepada penyerahan saham mereka. Responden-responden akan menerima bahagian-bahagian tanah mereka selepas tanah perayu selesai di pecah-bahagi. Perayu perlu menjalankan ukur tanah, membuat pembahagian, memecah-bahagi dan seterusnya

memindahmilikkan bahagian-bahagian mereka. Pecah-bahagi tanah mengambil masa kerana permohonan awal pecah-bahagi dilengahkan oleh proses pengambilan tanah yang dijalankan oleh kerajaan atas bahagian tertentu tanah perayu. Responden-responden amat menyedari tentang kelewatan yang disebabkan oleh pecah-bahagi tanah. Mereka juga sedar dari awal-awal lagi bahawa, selain dari ekar tanah tersebut yang terakru kepada mereka, perayu boleh menjual tanahnya yang lain bagi tujuan melunaskan hutang piutangnya.

(2) Fakta bahawa responden-responden telah memfail petisyen untuk menggulungkan perayu pada bulan November 2000, iaitu lebih kurang empat tahun selepas perintah persetujuan direkodkan, menguatkan hujah perayu bahawa pihak-pihak masih sedang berunding untuk penyelesaian, walaupun terdapat fakta bahawa di bawah perintah persetujuan obligasi pihak-pihak harus disempurnakan dalam tempoh dua belas bulan dari tarikh penyampaian perintah persetujuan. Selain itu, tiada alasan diberikan mengenai mengapa petisyen yang difailkan oleh responden-responden telah tidak didengar dan diputuskan pada tarikh pendengarannya yang pertama yang ditetapkan oleh mahkamah. Dalam halkeadaan sedemikian, tidak harus ada bantahan terhadap pemfailan tindakan untuk membatalkan oleh perayu pada bulan November 2008, kerana responden-responden sendiri gagal meneruskan dengan petisyen mereka yang difailkan pada tahun 2000 yang kini masih tergantung di mahkamah.

(3) Perayu mempunyai alasan-alasan yang adil untuk memfail permohonan untuk membatalkan petisyen apabila ia dengan suci hati membuat pembayaran ke mahkamah untuk membayar responden-responden jumlah yang dipersetujui di bawah perintah persetujuan. Oleh itu, responden-responden boleh dianggap telah bertindak secara yang menyusahkan yang mana itu merupakan satu alasan kukuh untuk membatalkan petisyen. Berdasarkan fakta dan halkeadaan kes, alasan kelengahan keterlaluan tidak boleh dihadapkan kepada perayu bagi menolak permohonan pembatalannya.

Case(s) referred to:

Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors [1986] 1 CLJ 493; [1986] CLJ (Rep) 279 HC

Australian Mid-Eastern Club Ltd v. Yassim 1 ACSR 399 ***(foll)***

De Montfort and Ors v. Southern Cross Exploration NL [1987] 17 NSWLR 468 ***(foll)***

Filotek Trading Sdn Bhd v. Buildcon-Cimaco Concrete Sdn Bhd [1999] 1 LNS 140 HC ***(foll)***

Nationwide v. Franklins [2002] 20 ACLC 308 ***(foll)***

Re Ballador Silk Ltd [1965] 1 All ER 667 ***(refd)***

Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(2)(a), 264

Companies (Winding-Up) Rules 1972, r. 32

Courts of Judicature Act 1964, s. 96

Rules of the High Court 1980, O. 18 r. 19

Companies (NSW) Code 1982, s. 364

For the appellant - Dato' Cyrus Das (LA Gomes, A Silvanathan, V Manoharan & Gary Xavier with him); M/s LA Gomes, Meor Shaazizi & Assocs

For the respondents - VS Viswanathan (A Mariadass with him); M/s Mariadass Lock & Ainuddin

[Editor's note: For the Court of Appeal judgment, please see Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2010] 4 CLJ 753.]

Reported by Usha Thiagarajah

JUDGMENT

Zaki Tun Azmi CJ:

[1] This appeal basically deals with the issue of whether the petition to wind up the appellant should be struck out under O. 18 r. 19 of the Rules of High Court (RHC) 1980. That rule provides for striking off on any pleading on grounds that it is frivolous, vexatious or an abuse of the process of the court[1]. That O. 18 r. 19 applies to striking out a petition to wind up a company is well established[2]. In answering whether this petition to

wind up the appellant has been filed on the grounds which are frivolous, vexatious or an abuse of the process of the court, we will also have to consider the following questions. They are:

a) Whether there was an inordinate delay in filing the application to strike out.

b) Refusal by the respondents to accept payments made into court by the appellant.

[2] Leave was granted on three questions which will be quoted in the appropriate part of this judgment.

Facts Of The Case

[3] The respondents are twenty-two petitioners who had under one petition filed for the winding up of the appellant, a company registered as a public company on the ground that the Appellant has failed and neglected to pay a sum of RM5,453,924.75 which the appellant had by a consent order agreed to pay the respondents. According to that consent order, appellant was to pay the individual respondents out of the aggregate sum different amounts out of that total amount mentioned earlier within twelve months of the service of the consent order, which period may be extended subject to payment of interest. The consent order dated 18 October 1996, was served on the respondents on 14 March 1997. In addition to payment of these monies to the respondents, each respondent was also to be given pieces of land of varying sizes totalling 65 acres. The respondents have been given vacant possession to those lands and in fact occupied and carried on activities on their respective pieces of lands and deriving income from these activities. For the purpose of this ground of judgment, the facts leading to the consent order need not be cited as they are not relevant to the issues and are not disputed.

[4] As a result of the failure on the part of the applicant to pay the amount due which is paramount to the consent order, in November 2000 the respondents filed a petition to wind up the appellant. Seven years later, an *ex parte* application for an appointment of provisional liquidator was made. Almost eight months after that, a provisional liquidator was appointed. On 7 November 2008, ie, eight years after petition to wind up was filed, an application was filed under O. 18 r. 19 to strike out the

petition. The Court of Appeal held that there was inordinate delay in filing the application under O. 18 r. 19 and dismissed the application to strike out.

[5] The appellant justified their actions by arguing that they had paid into court the amount due under the consent order together with interest towards settlement of the amount due to the respondents. This payment into court was made in April 2009, more than 12 years after consent judgment was made. That payment was however subject to the conditions that the respondents terminate the petition to wind up the appellant as well as the appointment of the provisional liquidators. According to the appellant, the respondents refused this and continued to stand firm on proceeding with their petition to wind up the appellant.

[6] The respondents' reason for refusing to accept the amount was, according to them, they feared that even if they accepted the amounts, these amounts were liable to be ordered to be paid back to the provisional liquidators as they may be construed as preferential payments under s. 264 of the Companies Act[3]. The appellant replied that the real reason for them insisting that the appellant to be wound up was that they wanted the 65 acres of land rather than the monies. As a result of the delay in appellant settling the amounts due with the respondents, respondents had wanted an additional 65 acres of land to be distributed amongst them *in lieu* of the cash payments. It was further claimed that the value of the 65 acres of land would be worth more than the amounts that were to be paid to the respondents. In short, the respondents were holding the appellant to "blackmail".

"Tender Of Payment"

[7] Counsel for the appellant, contended that since the appellant have paid RM7,685,062.38 into court in April 2009 and there was continued readiness to pay that was a sufficient answer to the claim for the debt. Both these arguments, are supported and answered in *Nationwide v. Franklins* [2002] 20 ACLC 308 at 310 Barret J, in the Supreme Court of New South Wales said

> Principles concerning tender and payment are discussed there *(Australian Mid-Eastern Club Ltd v. Yassim)* and I regard the matter as relatively clear. The defendant tendered the sum of $14,190 to the plaintiff but the plaintiff refused the tender. That

> refusal, Meagher JA tells us in the Australian Mid-Eastern Club case, means that the debt was not eliminated, a conclusion which is not surprising. **But as Meagher JA later observed, tender is an answer to a debt claimed if there is a continued readiness to pay, coupled with an actual payment into court.** As I read what his Honour said, the actions the defendant took and the other events which happened yesterday afternoon amount to what his Honour called an answer to a claim for the debt. On that basis the plaintiff's creditor status should probably be regarded as gone. (emphasis added)

[8] In an earlier Supreme Court of New South Wales referred to in the judgment, the decision of *Australian Mid-Eastern Club Ltd v. Yassim* 1 ACSR 399, the court agreed with the creditor that since the company was likely to be wound up and there were other creditors, the company would probably have to return payment in the event of a winding up order being made against the company. In *Yassim*'s case however, payment was tendered by cheque and not deposited in court as in the *Nationwide* case. In *Yassim*'s case, Meagher JA said:

> The tender is no answer to a claim for the debt unless (as did not happen here) there is continued readiness to pay coupled with an actual payment into court: see *Halsbury's Laws of England*, vol 9, 3rd ed, Butterworths, para 289, p 169.

I agree with the reasoning of the learned judges in both cases.

[9] I am further supported by the views of Needham J in *De Montfort and Ors v. Southern Cross Exploration NL* [1987] 17 NSWLR 468 at 471, where he said;

> It would, I think, be quite unacceptable for a creditor to serve a notice upon a debtor specifying a sum in that notice, then, when the debtor failed to comply with that notice, take proceedings, be paid the full amount claimed, and then seek to wind the defendant up nonetheless.

[10] In *De Montfort Case*, the creditor/plaintiff sought to wind up the debtor/defendant company notwithstanding that the creditor/plaintiff had paid the amount specified in the notice served on the debtors/defendant pursuant to s. 364 of Companies (New South Wales) Code 1982.

[11] As earlier mentioned, the payment into court was conditional. To me these conditions are fair. Why would a debtor want to make payment towards settlement of his debt if he continues to have the dagger hanging over his head? He would expect the creditor to withdraw the petition pending against him. It would make no difference if the respondents were to accept the money deposited into court and having to repay it later (because he is considered as preference creditor) or waiting for the appellant to be wound up and collecting his share of the dividends from the appellant. The net amount the respondents will finally get would be the same. If they were to take the money deposited into court, there is still a strong possibility that the company may not be wound up. I agree with the views of Barret J in *Nationwide* who said:

> It would be in no worse position if it accepted and was later forced to disgorge. There is nothing compelling a creditor somehow to remain pure by shunning a payment in respect of which there exists some theoretical future possibility of its proving to be preferential. A normally motivated creditor would be inclined to accept such a payment conscious of any risk of disgorgement, and with fingers crossed to the extent indicated by the circumstances.

[12] In this appeal before us, the respondents in my view had acted unreasonably by refusing to accept the tender of payment and the appellant's continued readiness to pay. This was shown by the appellant depositing the amount RM7,685,062.38 into court.

[13] As mentioned earlier, the appellant urged us to infer that the true reason for the respondents pushing for the winding up order was to force the appellant to transfer to them the 65 acres of land in place of the money compensation. In short, the petition was filed for a collateral purpose. In *Apirami Sdn. Bhd. v. Tamil Nesan (M) Sdn. Bhd. & Ors* [1986] 1 CLJ 493; [1986] CLJ (Rep) 279, VC George J following *Re Ballador Silk Ltd.* [1965] 1 All ER 667 at 672 A to B, stated that the court will dismiss a petition to wind up a company if it is satisfied that the petition was filed for a collateral purpose. Plowman J held that:

... A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the Court, and it is primarily on that ground that I would dismiss this petition.

Inordinate Delay

[14] The Court of Appeal dismissed the appeal on the grounds that there has been an inordinate delay on the part of the appellant in applying to strike out the petition. As mentioned above, the application under O. 18 r. 19 was made eight years after the petition was filed.

[15] The courts do not encourage parties to delay making any interlocutory application because by delaying such applications the final decision of the court will also be delayed. It had been the practice of some plaintiffs or defendants to wait until the last minute to file all sorts of interlocutory applications. Today the Malaysian courts are discouraging these practices. Parties, particularly now, should not delay proceedings by filing interlocutory applications when the substantive hearing can be fixed by the trial courts early. There is therefore no need to apply for striking off petitions to wind up a company (or for that matter, any pleadings) when the same issues could be raised in the hearing of the petition (or the action) and the matter to be finally determined. These expedition disposals have been proven by the practice of our New Commercial Courts and the New Civil Courts, where there are close monitoring of actions filed in that court and cases targeted to be completed within a year from filing.

[16] The Court of Appeal and this court (including any appellate court) abhor appeals in respect of interlocutory applications when issues raised in such application could be finally heard and disposed in the main suit. To me, seeking for certain interlocutory orders are sometimes merely delaying tactics taken up by a party who do not have a strong case. In some cases, delaying tactics can be taken up by a party to tire out his opponent with a view to forcing that opponent to an unfair settlement. Delay can cause injustice to a party particularly when he has a strong case. A company which is made a subject of winding up petition can suffer huge losses pending hearing of the petition, more so when a provisional liquidator has been appointed. As we know the service

charges of a provisional liquidator can be very high. They will eat into assets of the company to the detriment of the *bona fide* creditors or the shareholders of the company.

[17] Since delay in determining any application to strike out is detrimental to the parties, such application should be heard and decided upon early. Such application should not be considered except in obviously unsustainable proceedings. Where there is any doubt that discretion to strike out should be exercised, such application should be dismissed. Once dismissed, the subject matter of the action should proceed to hearing as soon as possible. The appellate court should be discouraged from spending too much time on an appeal against an order of refusal to strike out since, as I had said, the trial court will be deciding on issues raised by the applicant anyway. If the appellate court is of the opinion that such appeal is obviously to delay the hearing of the action at the trial court, it must be ready to discourage such action by imposing deterrent costs because it is an injustice to the innocent party. However, where it is an appeal against an order striking out any proceedings, the appellate court must be more considerate, since such an order is final. This argument equally applies in cases of applications for summary judgments. If such application for a summary judgement is refused, the appellate court should not waste too much time but to send the case for early disposal.

[18] As regards applying to strike out a petition to wind up a company, I would like to reaffirm the sentiments expressed by Abdul Hamid Mohamed J (as he then was) regarding invoking O. 18 r. 19 to strike out a petition to wind up a company. In *Filotek Trading Sdn Bhd v. Buildcon-Cimaco Concrete Sdn Bhd* [1999] 1 LNS 140, when discussing the subject said:

> The scheme under the Companies (Winding up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provision for judgement in default, summary judgment or striking out the

pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-Up) Rules 1972 do not provide for such procedures. They are not necessary.

Furthermore, more often than not, resort to O. 18 r. 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

[19] These views were further reiterated by Richard Malanjum JCA (as he then was) in *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634 but he also considered that in appropriate cases that procedure may be applicable:

We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O. 18 r. 19 of the RHC to strike out a petition presented under s. 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case, O. 18 r. 19 could be resorted to. Accordingly, we cannot therefore fully accede to the request of the learned counsel for the petitioners. In our view, the background facts of each case are relevant to determine whether a striking out application is appropriate. For instance in the present case, we find that there are matters that cannot be disposed of summarily yet the learned judge in the court below found them as facts.

[20] Even in this case before us, the petition could have just been remitted to the High Court since the grounds sought to strike out the petition could be raised at the hearing of the petition itself. However, if on the other hand, the grounds supporting the striking out the petition are truly plain and obvious, it would also be merely extending the delay as well as incurring more expense and cost for the case to be remitted to the High Court for the hearing of the petition.

[21] If by the act of one party, the other party can show satisfactorily to the court that, as in this case, an order for striking out the petition to wind up the appellant is plainly and obviously vexatious and abuse of the process of the court and this action to strike out is taken within a reasonable period of the act of the other party, there cannot be said to have been any unreasonable or inordinate delay by the party making the application. In considering whether a party has delayed taking steps to file his application, time must be calculated from the date the grounds supporting his application arose. This however does not mean that a party should be allowed to create a situation to enable him to justify the application before him.

[22] In my opinion the respondents before us had acted in a vexatious manner and abused the process of the court by continuing to seek for the appellant to be wound up even after the appellant had in good faith paid the money into court. Although there may not have been such reason when originally filing the petition to wind up the appellant, once the respondents insisted on persisting with the petition, they can be deemed to have acted in a vexatious manner. This is a ground for striking out the petition to wind up the appellant. In other words, although at the filing of any action, the petitioner may have acted in good faith, subsequent conduct or action by him may provide grounds for the other party to seek to strike out the action. The application to strike out the petition was filed soon after the tender for payment of respondents' claim was deposited in court. Therefore, there was no undue delay on the part of the appellant.

Questions

[23] Leave to appeal was granted in respect of the following three questions

a. Whether the Companies Act 1965 and the Winding-Up Rules 1972 permit a joint petition on a several judgment;

b. Whether s. 218(2)(a) permits a multi-creditor petition by allowing the aggregation of sums due to several individual creditors for purposes of presentation of winding up petition;

c. Whether a company may be deemed insolvent when it has paid its debt due in full into court.

[24] As I had stated at the beginning of this judgment, the question is essentially on the exercise of the discretion to strike out the petition. All the questions in the manner drafted need not be answered. An appeal, even at the Federal Court, is to correct an error committed by the lower court, if any. At the Federal Court, however, s. 96 of the Courts of Judicature Act 1964 requires leave before a civil appeal is heard and that leave be given only if the preconditions set out in that section are satisfied. Once leave is given, this court should not be bound by those questions allowed if it serves no purpose to answer. If the questions allowed need not be answered to decide the appeal justly, in my opinion it may hear the appeal and decide without answering the question. As I had said in *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51:

> But in my opinion the appellate panel is not prevented from granting leave to amend the question allowed by the leave panel or even to add in new question in order to achieve the ends of justice. The requirement of the applicant to draft a question is merely to assist the court in complying with r. 108(1)(c) of the Rules of the Federal Court as well as to enable the leave panel to identify the question intended by s. 96(a).

[25] The panel hearing the appeal proper may also amend or re-word the question to achieve the same objective. To answer a legal question not related to the facts of the case on appeal would be an academic exercise. The answer may also not be the *ratio decidendi* to the case and could be argued as not amounting to a *stare decisis*. At most, answering such questions could only be treated as an *obiter* or as a guide.

[26] In my opinion since this is our findings of the law it serves no purpose to remit the case back to the High Court.

[27] My brother judge, Mohd Ghazali FCJ, have read my judgment in draft and agreed with it. We therefore allow the appeal and order that the petition to wind up the appellant to be struck out. Cost is awarded to the appellant.

[28] Before judgment was delivered, parties were asked how much the cost should be and have agreed that is should be RM100,000 for the High Court, Court of Appeal and this court.

Since that is the amount agreed, of course by the parties, we therefore award RM100,000 as cost for this court and the courts below.

Zulkefli Makinudin FCJ:

[29] I have had the privilege of studying the judgment in draft of the learned Chief Justice and I agree with the views expressed and the conclusion reached by his Lordship in allowing the appeal and the order made that the petition to wind up the appellant be struck out. I would like to add a few words in support of the judgment with particular reference to the issue of whether there was an inordinate delay in filing the application on the part of the appellant to strike out the winding-up petition filed by the respondents as follows.

[30] On the respondents' allegation of delay on the part of the appellant in filing an application under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC 1980") to strike out the petition, I am of the view there are clear evidence that parties were negotiating for settlement all the way. From the beginning, when the Consent Order dated 18 October 1996 was recorded parties knew that settlement process would take time. The Consent Order was in two parts. Each respondent was to receive a certain sum of money and a certain portion of land in return for the surrender of their shares. The respondents were to receive portions of their land upon subdivision of Lot No. 19, CT No. 1242, in the Mukim of Ulu Telom Cameron Highlands. This was clearly provided for by the Consent Order which stated *inter alia* that the appellant was to conduct a survey, allocate, subdivide and transfer the said land. The subdivision took time as the initial submission for subdivision was delayed by land acquisition process carried out by the Government on certain portion of the appellant's land. (See the affidavit of Panirselvam affirmed on 9 July 2008 at pp. 224-230 and the affidavit of Summugam affirmed on 21 August 2008 at pp. 1384-1398 of the appeal record). The respondents were well aware of the delay caused by the subdivision. They were also aware from the beginning that other than the 60 acres of land due to them, the directors of the appellant could sell the other lands to settle the appellant's debts.

[31] It is also to be noted that the respondents filed the petition to wind up the appellant in November 2000, about four years after the Consent Order was recorded. This fact fortifies the

appellant's contention that the parties were negotiating for a settlement despite the fact that under the Consent Order the obligations of the parties were to be performed within the period of twelve months of the service of the Consent Order.

[32] A question that can be posed in this case and which has remained unanswered especially by the respondents is in relation as to why the petition filed by the respondents in the year 2000 was not proceeded forthwith by the respondents to be heard and disposed of. It is to be noted that under the Companies Act 1965 and the Companies (Winding-Up) Rules 1972 ("the 1972 Rules") the respondents as the petitioner in this case had to comply with the procedural requirements of the law such as service of the petition to the relevant parties, the advertisement and gazetting of the petition before the hearing date of the petition fixed by the court. A hearing date normally is given straight away when the petition is issued by the court. If the respondents as the petitioner has not complied with all the procedural requirements as spelt out under r. 32 of the 1972 Rules, the Registrar will not issue a Registrar's Certificate and no order save as to an order for the dismissal or adjournment of the petition shall be made on the petition of any petitioner at the hearing of the petition. In the present case we do not know the reasons why the petition of the respondents was not heard and disposed of at the first hearing date fixed by the court.

[33] I am of the view it would appear nothing objectionable if the appellant in the present case was to file the application to strike out the petition in November 2008 if the respondents as the petitioners themselves have not proceeded forthwith to deal with the petition filed in the year 2000 pending before the court. As for the appellant, it had a justifiable ground to file the application to strike out the petition when in good faith it had made payment into court to pay to the respondents the agreed sum under the Consent Order but was refused by the respondents who insisted on continuing with the petition. For this as rightly stated by the learned Chief Justice the respondents can be deemed to have acted in a vexatious manner and is a good ground for striking out the petition to wind up the appellant.

[34] Based on the facts and the circumstances of this case and for the reasons abovestated, I am of the considered view that the ground of inordinate delay cannot be attributed to the appellant to dismiss its application to strike out the petition under O. 18 r. 19 of the RHC 1980.

Endnotes:

1. (19) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

   (a) it discloses no reasonable causes of action or defence, as the case may be; or

   (b) it is scandalous, frivolous or vexatious; or

   (c) it may prejudice, embarrass or delay the fair trial of the action; or

   (d) it is otherwise an abuse of the process of the Court;

   and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2. *NKM Development Sdn Bhd v. Irex Sdn Bhd* [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56; *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 1 LNS 26; *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ 657, *Filotek Trading Sdn Bhd v. Builcon-Cimaco Concrete Sdn Bhd* [1999] 1 LNS 140; *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634.

3. Companies Act 1965, s. 264.

   Distribution of property of company

   Subject to the provisions of this Act as to preferential payments the property of a company shall, on its winding up, be applied *pari passu* in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.